O. Carriage of Goods by Sea/44

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M.V.V.
9/7.

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21/7

Office of the R.L.A.

Paragraph 2(d) of Article IV of the Rules in the Schedule to the Indian Carriage of Goods by Sea Act, 1925, provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act of God. The Bill of Lading in the present case contains a similar provision. The Phrase "act of God" was defined in Nugent V.Smith (1876 I.C.P.D.423 at p.444) as "an accident that is due to natural causes directly and exclusively without human intervention and that could not be prevented or averted by the exercise of reasonable care." In the law of common carriers it is used by way of contrast with the act of man. A common carrier is excused in the case of loss of goods in a storm, but is liable for loss due to theft or robbery since otherwise he might collude with thieves and robbers (see Iyer's Law of Torts pp. 279,579). It appears from the letter of the Bombay Steam Navigation Company at p.3 ante that the S.S.'Englishtan' carrying Government's consignment of 6447 bags of gram dal/ and 1169 bags of rice from Karachi to Bombay met with rough weather on the voyage as a consequence of which 368 bags of gramdal and 99 bags of rice were damaged. The damage was prima facie due to an "act of God". Consequently the contention of the Bombay Steam Navigation Company that it is not liable for the damage caused to 368 bags of gramdal and 99 bags of rice would seem to be valid.

2. The next question for consideration is whether the New India Assurance Company is liable for the damage caused to 368 bags of gramdal and 99 bags of rice.

3. The Marine Insurance Policy at p.9 ante issued by the New India Assurance Co., Ltd., contains the clause "warranted free from a Particular Average unless the vessel or craft be stranded sunk or burnt etc." "General average" and "Particula average" are technical terms which are in common use in shipping circles today and which constantly occur in the relative documents including policies of marine insurance. "A general average differs from a particular average in its nature and incidence. The former is a partial loss voluntarily

incurred for the common safety and made good proportionately by all parties concerned in the adventure; the latter is a partial loss fortuitously is caused by a maritime peril and which has to be borne by the party upon whom it falls" (Mc. Arthur, 2nd edition p.163; N. Barwell's Law of Insurance in British India P.104). The damage has been caused in the present case by maritime peril. Consequently it appears that the New India Assurance Company would not also be liable for the damages caused to 368 bags of gramdal and 99 bags of rice. But this is a complicated matter and it would be advisable to have this case considered by Messrs. Little & Coy.

Id/- P.N.H.
7/2/44.

Remembrancer of Legal Affairs.

U.R. to Addl. Director of Civil Supplies (Accounts)., No.1039 dated the 8th February 1944.

4-Cs.

M.V.V.
9/7.

R.I.No. 4478/19.5.44.

Submitted.

2. Please see A.D.C.S. (A/cs) note at p.51 ante. It appears from the papers that country craft Maneckprasad, which sailed from Nagothana, Kolaba District on 26.2.44 with 820 Baskets of charcoal belonging to Govt. sank on 1.3.44 at Karanja creek on it-s way to Bombay with all the charcoal overboard. Another craft 'Ramprasad' which sailed from same place on 23.3.44 with 880 baskects of charcoal, also sank near

P.3 ante Sambri Port on 24.3.44. The tindal Naran Soma of Manekprasad in his solemn declaration states that "while coming out of the Karanja creek near the customs station, suddenly planks of the vessel got loose and water began to enter, with the result that the vessel turned over and the whole cargo of charcoal which was loaded at Nagothna for Bombay was destroyed ..... "The

P.5 ante. Preventive Officer, Karanjia in his letter to the A.D.C.S. states that the country craft met with an accident as a result of strong gale with forcible current of the tide at about 2 p.m. on 1.3.44

P. 25 & 35 ante. The tindel of 'Ramprasad' in the statement made before the Range Forest Officer, Nagothna stated that no sooner had he moved 1/4th of mile from Sambri the lower plank of the vessel got loose and water began to rush in at about 10 o'clock at night on 24-3-44 and the country craft sunk. The total loss to Govt. is estimated to be Rs.2743-7-0. Mr. Vishram Khimáji, the transport contractor, was informed that in view of conditions of the agreement entered into with him he would be liable for the loss. (p.39). The contractor has replied that he is merely a carrier and the agreement does not provide for liability for the sinking of vessels (p.45) The A.D.C.S.(A/ cs) states that the charcoal was not insured against marine risks either by Govt. or by the shipping contractors but in view of the provisions of clause 5 of the agreement, the shipping contractors would be liable to make good the loss. The R.L.A. is requested to advise.

P.T.O.

2. Sec.2 of the Carriage of goods by Sea Act, 1925 (XXVI of 1925) provides that subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. Section 3 provides that there shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship. Sec. 5 provides that Article VI of the Rules shall in relation to the carriage of goods by sea in sailing ships carrying goods from any port in British India to any other port whether in or outside British India have effect as though the said Article referred to goods of any class instead of to particular goods and as though the second paragraph of the said Article were omitted. 'Ship is defined in Article I(d) to mean any vessel used for the carriage of goods by sea. Article II provides that subject to the provisions of Article VI, under every contract of carriage of goods by sea, the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities liabilities, and entitled to the rights and immunities hereinafter set forth. Section 1 of Article III provides that the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship sea-worthy etc. After receiving the goods into his charge the carrier has to obtain a bill of lading which shall be prima facie evidence of the receipt by the carrier of the goods (cf. clauses 3 and 4). Clause 8 provides that any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure is the duties and obligations

provided in this Article or lessening such liability otherwise than as provided in the Rules, shall be null and void and of no effect. Section 1 of Act IV provides that neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied etc. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section. Sec. 2 provides that ~~xxight~~/ neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from ——

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship

.....

(c) perils, dangers and accidents of the sea or other navigable waters

(d) act of God

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants ~~xx~~ of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception .....etc.

Article VI provides that nothwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier of such goods, or his obligations as to seaworthiness, so far as this stipulation is not contrary to public policy or the care or diligence of his servants or agents in regard to the loading, handling

stowage, carriage, custody, care and discharge of goods carried by sea, provided that in this case on bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect. Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

4. In the present case whenever coal was sent from one port to another a receipt in the form as at pp.7,13,23 ante was given to the tindel although it contained no terms as stated in Art. VI. The terms and conditions were presumably entered into in the form of an agreement as at pp. 47-49 ante with the contractor as he was required to transport charcoal regularly from various ports mentioned in clause 2 of the agreement in the Kolaba Dist. during the fair season in 1943-44. Clause 3 provides for deposit with Govt. of Rs.2500/- as security for the fulfilment of the contract. Clause 5 provides that the contractor shall undertake to deliver at Bombay all the quantities measured in the presence of his representatives at the loading port at shall be responsible for any loss in transit resulting from theft, submersion etc. which may be detected by remeasurement on unloading after making allowance for the usual percentage against waste and dryness and shall compensate Govt. for all such losses. 'Submerge' means to plunge under water; to overflow with water; to drown (cf. Chamber's English Dictionary , p.1000). In the present case it appears from the Preventive Officers report that due to stormy weather on 1.3.44 the planks of the vessel suddenly got loose with the result that the vessel turned over and the craft sank into the sea.(p.3 ante).

.....It is however not clear the circumstances under which the second vessel sank. If it is considered to be an act of God clearly the contractor would not then ~~khmx~~ be liable for the loss of charcoal under clause 5 of the agreement. At least this appears to be so in the case first vessel. "The carrier is not responsible for the consequences of an act of God; but where goods are injured by such an extraordinary occurance, the carrier is none the less liable for the damage, if any neglience of his has contributed to that damage. To avoid the consequences of an act of God the carrier must take all reasonable means to protect the goods; but he is not bound to make extraordinary efforts. The act of God is no excuse unless it was the immediate cause of the damage. " (cf. Halsbury's Laws of England Vol. IV, p.14) In Nugent v. Smith(1876) 1 C.P.D. 423 the deft a common carrier by sea from L to A received from plff. a mare to be carried to A for hire. In the course of the voyage the ship encountered rough weather and the mare received such injuries that she dies. The jury found that the injuries were caused partly by more than ordinary bad weather and firstly by the conduct of the mare hereself by reason of fright and consequent struggling, without any negligence of deft's servants, and it was held that the deft. was not liable for the death of the mare. (cf. English and Emp. Digest, Vol. 8,p.18). In the present case the D.C.S. (A/C) in consultation with the Mercantile Marine Deptt. should decide whether the weather was so rough and the sea was so stormy that it would be considered to be an act of God. Clause 5 of the agreement covers loss to goods due to submersion but not due to sinking of the crafts etc. It is therefore doubtful whether the contractors cound be held liable for such loss.

P.S.Nadkarni.

Id/-
27/5.

4-Cs.

M.V.V.
9/7.

S.A.S.

'A' Cl.5 of the agreement at p.47 ante does not contemplate the complete loss of charcoal due to sinking of vessels. The loss cannot therefore be recovered from the shipping contractors under that clause. 'A'

R.T.K.
Id/-
5/6.

A.L.R.

I am not sure what "submesion". means in the contract. I think it contemplates a case of damage to the cargo by sea water leaking into the hold.

It does not appear to be a technical word. There is no definition of it in Hulsluny. The contract appears to contemplate the arrival of the cargo, not a complete low. I agree with S.A.S. and suggest his note for reply.

Id/- R.S.H.
Id/-
8/6.

R.L.A.

I agree. I dont think the contractor can be liable for loss occassioned by sinking of the vessel in stormy weather.

Reply as suggested.

Id/-
P.N.M.
12/6.

'A' to 'A'

U.O.R. to F. D. (Supply) No. 4460, dated 26.6. 44.

4-Cs.

M.V.V.
9/7.